Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

MAURICE A. MASON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
ELISABETH A. LONG
Deputy Solicitor
ADAM VAN HO
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
Keith Smith, Warden

CAPITAL CASE — NO EXECUTION DATE SET

QUESTION PRESENTED

Did the Sixth Circuit exceed its authority under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it concluded that trial counsel provided ineffective assistance at sentencing instead of deferring to the Ohio Supreme Court's objectively reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

LIST OF PARTIES

The Petitioner is Keith Smith, the Warden of the Mansfield Correctional Institution. Smith is substituted for his predecessor, Betty Mitchell. See Fed. R. Civ. P. 25(d).

The Respondent is Maurice Mason, an inmate at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Keith Smith, the Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit in this case. In the alternative, the petitioner respectfully requests that this petition be held pending the Court's decision in *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak*, 2009 U.S. Lexis 1536 (Feb. 23, 2009), which also presents the issue of ineffective assistance of counsel in the AEDPA context.

OPINIONS BELOW

The United States District Court for the Northern District of Ohio's order granting a conditional writ is reproduced at App. 1a-2a. The Sixth Circuit's opinion ordering the district court to grant a conditional writ is reproduced at App. 5a-59a. The district court's opinion and order denying the writ after conducting an evidentiary hearing on Mason's claim of ineffective assistance at mitigation is reproduced at App. 60a-104a. The Sixth Circuit's opinion and order remanding the case to the district court for an evidentiary hearing is reproduced at App. 105a-187a. The district court's initial opinion and order denying habeas relief is reproduced at App. 188a-296a. The Ohio Supreme Court's opinion affirming Mason's conviction and sentence on direct review is reproduced at App. 297a-344a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit denied the State's petition for rehearing on February 19, 2009. Justice Stevens

extended the time period to file a petition for writ of certiorari to July 20, 2009. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the evidence

presented in the State court proceedings.

INTRODUCTION

After significantly investigating possible mitigating evidence, Respondent Maurice A. Mason's trial counsel faced a dilemma in selecting a mitigation strategy. Counsel knew the prosecution hoped to introduce evidence that Mason raped a young woman only months before the rape and murder for which Mason was being sentenced, as well as evidence of Mason's prior convictions and long history of drug use. Counsel also knew that Ohio law permits prosecutors "to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false," *Ohio v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988), and he reasonably believed the trial judge had a "hair trigger" approach to allowing rebuttal evidence, J.A. 1737. Thus, even though counsel knew that Mason's background might yield mitigating evidence, counsel had to decide whether the benefits of that evidence outweighed the risk of opening the door to the prosecutor's powerful rebuttal evidence. Counsel decided the risks outweighed the benefits and selected a mitigation strategy that did not involve Mason's background. Consistent with that strategy, counsel stopped investigating Mason's background.

The Sixth Circuit Court of Appeals granted Mason habeas relief, concluding that Mason received ineffective assistance of counsel at mitigation. In doing so, the Sixth Circuit refused to give deference to trial counsel's reasonable strategic decision, cf. *Strickland v. Washington*, 466 U.S. 668, 689 (1984),

and instead closely scrutinized both counsel's mitigation strategy and his corresponding decision to limit his mitigation investigation. The Sixth Circuit simultaneously refused to defer to the Ohio Supreme Court's resolution of Mason's ineffective assistance claim, in direct contravention of AEDPA. Instead, the federal court rejected the state court's conclusion that trial counsel's performance was constitutionally sufficient and that Mason did not establish prejudice. The standard articulated by the Sixth Circuit places trial counsel in the impossible position of having to choose between providing ineffective assistance in one of two ways: either by opening the door to damaging rebuttal by introducing mitigating evidence, or by failing to introduce mitigating evidence that may help the defendant.

This Court should grant review and reverse the Sixth Circuit's opinion ordering the issuance of a conditional writ.

STATEMENT OF THE CASE

A. Mason raped and murdered a nineteen-year-old woman.

On February 8, 1993, 19-year-old Robin Dennis disappeared. App. 7a-8a. According to her missing persons report, Dennis was last seen with Maurice A. Mason. App. 8a. Dennis and her husband had socialized with Mason and other friends on the morning of her disappearance. At that time, Dennis's husband discussed trading his .22 caliber Colt Frontier Scout revolver for Mason's television. *Id.*

The day after Dennis was reported missing, police received a report of an abandoned car in rural

Marion County, Ohio. *Id.* When police investigated, they found Chevron-style shoe impressions, similar to those made by shoes owned by Mason and Dennis, on the passenger side of the car's dashboard and outside the passenger door. *Id.* They also found Type B blood, Dennis's blood type, on the passenger door. A set of keys, including a key that fit a car owned by Mason's wife, was on the car's front passenger seat. *Id.*

Dennis's body was found several days later in an abandoned building. The building was located approximately an 18-minute walk from the abandoned car. App. 9a. Dennis was wearing only a bra, and her underwear and jeans were around her ankles and lower legs. Her head, face and body were covered with bruises. *Id.* Dennis's car keys, t-shirt, and jacket, covered with burrs and debris, were eight feet from her body. *Id.* A blood-stained board with protruding nails—the suspected murder weapon—was approximately 20 feet from Dennis's body. Officers also recovered hair strands on a second piece of wood, later determined to match Dennis's hair, and a small blood-stained piece of metal consistent with the handle of a .22 caliber Colt Frontier Scout revolver. *Id.*

The county coroner determined that Dennis died from blunt-force trauma to the head, which had caused multiple skull fractures. *Id.* The coroner also found sperm in Dennis's vagina and underwear, which DNA experts later matched to Mason's DNA. App. 10a (noting that they did not find DNA from anyone other than Dennis and Mason).

A sheriff's deputy and a second witness had both seen Mason in the vicinity of the abandoned

building at the approximate time of Dennis's murder. App. 8a, 62a.

B. A jury convicted Mason and recommended a sentence of death, which the state trial court accepted.

Mason pleaded not guilty to charges of aggravated murder, with a death penalty specification; rape, with a prior aggravated felony specification; and having a weapon while under a disability. A firearm specification was added to each count. App. 10a. At trial, a jury convicted Mason of all three charges. App. 11a.

During the sentencing phase of Mason's trial, the defense offered the testimony of two deputy sheriffs about Mason's good behavior while incarcerated. *Id.* Mason's wife, mother, brother, sister, and cousin then asked the jury to show mercy and spare Mason's life. *Id.* Mason's wife also described Mason's artistic talent, and the jury examined his drawings. *Id.* Finally, Mason made an unsworn statement, in which he denied killing Dennis and asked the jury for a life sentence. *Id.* Although defense counsel had prepared 12 mitigation exhibits and a videotaped deposition of Dr. Joseph T. Spare, a psychiatrist who examined Mason, counsel decided not to introduce this evidence to avoid the State's rebuttal. The defense rested, and the State offered no rebuttal evidence. *Id.*

The trial judge instructed the jury on three possible sentences: death, life with parole eligibility after 30 years, and life with parole eligibility after 20 years. App. 11a-12a. After less than six hours of deliberations, the jurors said they were

"irreconcilably deadlocked on the three sentencing options." Sentencing Tr. 4368. After receiving an additional instruction, the jury continued deliberations for approximately three hours before recessing for the evening. *Id.* at 4373-74, 4376. The following morning, the jury reconvened and deliberated for five minutes before reporting a unanimous verdict recommending death.[1] *Id.* at 4379, 4382.

The trial court accepted the jury's recommendation and sentenced Mason to death. The court denied Mason's motion for a new trial. App. 12a.

C. The state courts affirmed Mason's conviction and sentence on direct review, and denied him post-conviction relief.

On direct review, both the intermediate state appeals court and the Ohio Supreme Court affirmed Mason's conviction and sentence. See App. 303a-304a. The Ohio Supreme Court specifically rejected Mason's claim that he received ineffective assistance of counsel at mitigation because trial counsel should have gathered and presented evidence about Mason's background. The court concluded that counsel's decision to stop investigating and not to introduce evidence of Mason's psychological and family history was reasonable because "Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal." App. 341a. The court also found that

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[1] Earlier votes had been 11-1 in favor of the death penalty. Mary Downs Aff. ¶ 8, July 11, 1994.

Mason had not satisfied the second prong of *Strickland* because he failed to show that counsel's performance caused actual prejudice.

While his direct appeal was pending, Mason filed a petition for state post-conviction relief. See App. 13a. The trial court denied relief, and the intermediate state appeals court affirmed. The Ohio Supreme Court dismissed the appeal as not involving a substantial constitutional question. *Id.*

D. The federal district court initially denied Mason habeas relief and again denied relief after conducting an evidentiary hearing on ineffective assistance at mitigation.

Mason filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. J.A. 28-206; see J.A. 207-377 (corrected habeas petition). The district court denied relief, App. 188a, but the Sixth Circuit reversed and remanded for an evidentiary hearing on Mason's claim of ineffective assistance at mitigation, App. 106a-107a.

On remand, the district court held a three-day evidentiary hearing. App. 60a-61a. Mason's habeas counsel called the following witnesses: Mason's trial counsel, Lawrence Winkfield and Ted Coulter,[2] App. 68a-78a; an attorney who testified about professional standards for capital representation in 1994, App. 78a; a clinical psychologist who testified about Mason's background and Dr. Spare's evaluation, App. 79a-80a; a psychologist who examined Mason

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[2] Winkfield was responsible for the guilt phase of Mason's trial, and Coulter took the lead on the mitigation phase. J.A. 1515.

during state post-conviction proceedings, App. 80a-81a; a mitigation specialist, App. 81a; and several of Mason's family members, App. 81a-82a. The State then introduced Danielle Miller Richardson's testimony that Mason raped her, as well as the testimony of Mason's prior girlfriend that she had told Mason's trial counsel that Mason had treated her violently in the 1980s. App. 82a-83a.

After reviewing the parties' post-hearing briefs, the district court again denied the writ, reasoning that, "[n]ot only did counsel perform a thorough investigation of [Mason's] background and social and family history, counsel's mitigation presentation strategy cannot be assailed." App. 96a. The court concluded that trial counsel's performance was not deficient at mitigation, and that any alleged prejudice was unclear. Finally, the court reviewed the Ohio Supreme Court's resolution of Mason's ineffective assistance claim and concluded that it was "not an unreasonable application of or clearly contrary to any United States Supreme Court precedent." App. 102a.

E. The Sixth Circuit concluded that Mason received ineffective assistance of counsel at sentencing, and granted habeas relief.

After reviewing the evidence from the district court's evidentiary hearing, the Sixth Circuit granted Mason habeas relief. App. 7a. The Sixth Circuit's analysis focused on what trial counsel knew when he selected a mitigation strategy, several days before the sentencing phase began. The court outlined Coulter's investigative efforts, then concluded that his "efforts to learn any further details about Mason's background were woefully inadequate" and

thus could not support his strategic mitigation decision. App. 33a-34a. The Sixth Circuit also concluded that trial counsel's inadequate investigation prejudiced Mason because, in light of the jury's initial deadlock at sentencing, there was a reasonable probability that "[e]ven a slightly more compelling case for mitigation . . . might have altered the outcome of the sentencing phase." App. 34a. After a perfunctory nod toward AEDPA, the Sixth Circuit concluded that the Ohio Supreme Court had unreasonably applied *Strickland* and was objectively unreasonable in finding no prejudice.

Chief Judge Boggs in dissent argued that Mason was not entitled to relief. He observed that the majority did "not point to a single significant piece of evidence in the record of which Coulter was unaware due to his failure to investigate further." App. 52a (emphasis omitted). Coulter therefore "possessed all of the essential facts regarding Mason's background necessary to make a reasonable strategic choice," App. 55a, and the Sixth Circuit did nothing more than second-guess that choice. The dissent saw "no reason to believe that *any* competent defense counsel," having conducted adequate mitigation investigation, would choose a mitigation strategy that risked opening the door to testimony about a rape that was "eerily similar" to the facts of Mason's case. App. 56a. Therefore, Chief Judge Boggs concluded that Mason was not prejudiced by any alleged deficiencies in counsel's mitigation performance.

Over the dissent of Chief Judge Boggs, the Sixth Circuit denied the State's request for rehearing or rehearing en banc. App. 3a-4a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's judgment for two reasons. First, this is just one of several recent Sixth Circuit decisions that set unreasonably high standards for trial counsel's mitigation performance, and one of those cases is currently pending on the merits before this Court. See *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak*, 2009 U.S. Lexis 1536 (Feb. 23, 2009); see also *Awkal v. Mitchell*, 559 F.3d 456 (6th Cir. 2009), petition for en banc review pending; *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir. 2008). This Court has long made clear that counsel's strategic decisions "are virtually unchallengeable" if made "after through investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S. at 690. But here the Sixth Circuit found that trial counsel's mitigation investigation was inadequate without identifying a single piece of significant evidence about which counsel was unaware. See App. 52a (Boggs, C.J., dissenting). The court nevertheless declined to defer to trial counsel's sound decision to adopt a mitigation strategy designed to avoid damaging rebuttal evidence, and thereby simultaneously rejected counsel's corresponding decision to limit his mitigation investigation accordingly.

Second, this case is yet another example of the Sixth Circuit's disregard for principles of comity and federalism in the habeas context. See, e.g., *Spisak*, 512 F.3d 852; *Awkal*, 559 F.3d 456. The Sixth Circuit has repeatedly ignored AEDPA's mandate that federal habeas courts afford great deference to

state court judgments. Here, the federal court afforded *no* deference to the state courts' objectively reasonable resolution of Mason's claim. This is particularly troubling because the state courts' evaluation of counsel's mitigation performance turned on its interpretation of *state* rules of evidence: The Ohio Supreme Court found that trial counsel's strategy was reasonable because counsel was justifiably concerned that introducing background evidence would open the door to highly damaging rebuttal. But the Sixth Circuit displaced the Ohio Supreme Court's judgment with a contrary interpretation of Ohio's evidentiary laws and concluded that trial counsel's mitigation strategy, and corresponding decision to limit his mitigation investigation, amounted to inadequate representation. Similarly, the federal court declined to defer to the state courts' reasonable finding that Mason was not prejudiced by any alleged deficiency in trial counsel's mitigation performance.

A. The Sixth Circuit improperly expanded the definition of "ineffective assistance of counsel at mitigation" by refusing to give deference to trial counsel's reasoned strategic decisions.

Mason's trial counsel faced a dilemma in selecting a mitigation strategy: If he introduced evidence of Mason's background, he would risk the introduction of rebuttal testimony that might seriously impair Mason's chances of receiving a life sentence. See J.A. 1600-01 (Coulter's description of the state's rebuttal evidence). The prosecution was prepared to introduce evidence that Mason raped and threatened to kill Danielle Miller four months

before raping and murdering Robin Dennis, as well as evidence of Mason's "past convictions, burglary and trafficking and drugs." J.A. 1601; see J.A. 1416-33 (transcript of Miller's interview with police). Counsel ultimately decided not to present evidence of Mason's background, and proceeded accordingly.

The Sixth Circuit found constitutional fault with trial counsel's choice not to risk the introducing of damaging rebuttal evidence. But the court came to this erroneous conclusion by improperly blending the standard for reviewing counsel's strategic decisions with the standard for reviewing the adequacy of a mitigation investigation. By doing so, the Sixth Circuit manufactured a new, higher standard for counsel's mitigation performance that is in conflict with *Strickland*'s deferential posture toward counsel's reasonable conduct.

Strickland set forth the familiar two-part test for evaluating ineffective assistance claims. To establish ineffective assistance of counsel, a defendant must: (1) show that counsel's performance "fell below an objective standard of reasonableness," as determined by "prevailing professional norms," 466 U.S. at 688; and (2) demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. When applying *Strickland*, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "[j]udicial scrutiny . . . must be highly deferential." *Id.* at 689. Counsel's strategic decisions "are virtually unchallengeable" if they are made "after thorough investigation of law and facts relevant to plausible options." *Id.* at 690; see

Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."). In accord with this presumption, courts must strive "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Under *Strickland* and its progeny, the mitigation performance of Mason's trial counsel is unassailable for two reasons. First, counsel's mitigation investigation was sufficient because Mason cannot identify any significant aspect of his background about which counsel was unaware before he selected a mitigation strategy. App. 52a (Boggs, C.J., dissenting). In fact, counsel had a very representative picture of Mason's background when he chose a mitigation strategy. Second, counsel's strategic decision—to forgo both additional investigation and the presentation of background evidence in mitigation—followed from carefully balancing the benefits of any possible mitigating evidence of Mason's background against the risk that such evidence would open the door to highly damaging rebuttal evidence. Counsel concluded that, whatever background evidence he might uncover through additional investigation, he would never introduce it because he did not want to risk rebuttal. The analysis motivating counsel's decision to limit his mitigation investigation was therefore identical to the analysis leading to counsel's selection of a mitigation strategy. Accordingly, even though the Sixth Circuit granted habeas relief in the name

of an inadequate mitigation investigation, the court actually reached that decision only by second-guessing trial counsel's reasonable strategic decisions after the fact.

1. Trial counsel had sufficient information to support his decision to abandon further background investigation.

When a habeas petitioner alleges that trial counsel's mitigation strategy was not supported by sufficient investigation, this Court "focus[es] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of background *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Here there is no doubt that counsel conducted a reasonable investigation before selecting a mitigation strategy. The record confirms that counsel was aware of each potentially significant aspect of Mason's family background before deciding to discontinue investigation.[3]

Trial counsel accumulated numerous documents relevant to Mason's background and spoke with many of Mason's family members. After conducting

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[3] The Sixth Circuit made much of Coulter's inability to remember exactly when he conducted specific interviews or other parts of his investigation. When Coulter testified at the evidentiary hearing, however, he was trying to recall the details of an investigation conducted ten years earlier. App. 50a (Boggs, C.J., dissenting). And Mason bears the burden of proving that counsel's investigation was ineffective; counsel does not bear the burden of proving the converse. *Id.* Furthermore, even if Coulter conducted additional investigation after selecting a mitigation strategy, that does not undermine the reasonableness of his strategy. Counsel often continues to investigate and to reassess strategy as a trial progresses.

multiple interviews with Mason, J.A. 1593-94, Coulter spoke to Mason's wife, J.A. 1586; mother, J.A. 1612; father, J.A. 1680; brother, J.A. 1654-55, 1680; sister, J.A. 1680; and aunt, J.A. 1656-57, 1661. He contacted Mason's probation officer, J.A. 1659-61; a social services employee who had supervised Mason as a child, J.A. 1586, 1589; and the corrections officers supervising Mason in jail, J.A. 1612. Coulter arranged for Mason to have a psychiatric assessment, J.A. 1170-1235, 2277-88; attempted to secure a mitigation specialist, J.A. 1621-26, 1360-63; and contacted the public defender's office to discuss strategy, J.A. 1599-1600. He reviewed thousands of pages of documentation about Mason. J.A. 1585; see App. 345a-388a (describing documents the prosecutor provided to Coulter). These documents included information about Mason's criminal history, parole, education, medical records, history with Children's Services, evidence of drug use by Mason's parents during his childhood, Mason's alleged abuse at his father's hands, Mason's history of running away, and Mason's history of drug use and trafficking at an early age. See *id.* Counsel also tracked down the State's most damaging potential rebuttal witness. J.A. 1654.

Although these sources provided some conflicting information about Mason's past, they clearly identified the aspects of Mason's background that were likely to yield potential mitigating evidence. For example, Dr. Spare's psychiatric report described Mason's childhood as follows:

> Mr. Mason reports that he became aware at an early age that his parents were involved in the "drug scene." He states

> that it was well known in the neighborhood that they were sellers of drugs and he found this embarrassing. In spite of this concern, he began himself to use marijuana in about the fifth grade.
>
> He apparently initially obtained marijuana from his parents' [sic] home and then began a pattern of stealing and running away which caused increasing problems.
>
> His parents apparently objected to his running away, skipping school, and stealing from them in order to obtain drugs or stealing their drugs, and he was the subject of frequent punishments.

J.A. 2277. Coulter's own notes also indicate that Mason was "[b]orn in a drug-related family, family deals in drugs and does now, drug programs. . . . both parents to prison for drugs." J.A. 1616. Coulter clearly knew Mason's history of drug abuse and trafficking, and that Mason's nuclear family had exposed him to drug use and trafficking at a very young age.

Coulter also knew Mason was "[r]aised in a home . . . with the tendency of his father to be abusive toward him." J.A. 2279; see also J.A. 2194 ("This young man comes from a family which has had many problems over the years . . . . He has been exposed to quite a lot of violence. . . ."). Mason had described his childhood habit of running away, explaining that his parents would generally find him in "one or two days. Later, beat the shit out of me. I mean tied me down with rope and did it to me, then put me in my room." Probation and Institutional

Report, Marion County C.P., No. 84-CR-20, at 2 (Apr. 18, 1984). On one occasion when Mason was 13 years old, Mason's father was arrested for assaulting him. J.A. 2185-91. Counsel also knew Mason may have been abused by his mother. J.A. 1672. Counsel may not have known the precise scope of violence or abuse in the Mason household, but he certainly knew further investigation of these areas would likely yield additional mitigating evidence.

The district court later conducted an evidentiary hearing on remand, hearing the evidence that Mason alleges his trial counsel should have discovered and presented at mitigation.

> The district court summarized this evidence as showing that Mason's father ran a prostitution ring for three years, that he operated a home-based drug business with ten employees selling drugs for him, that both of Mason's parents were daily drug users as well as traffickers, that Mason's mother shot his father because of his involvement with prostitution, and that Mason's parents regularly abused Mason and isolated all of their children from anyone not associated with the parents' drug dealing activities. Further, the evidence demonstrated that Mason had experimented with drugs as an eight-year old, that Mason's father took him along on trips to purchase and sell drugs while Mason was in the sixth and seventh grades, and that Mason had a borderline personality disorder largely as a result of his dysfunctional home environment.

App. 34a-35a (internal citations omitted). Based on this narrative, the only aspect of Mason's background that counsel may have not known to investigate at the time he chose a mitigation strategy was that Mason's father had been involved with prostitution. Counsel had some knowledge of each other area of Mason's history and would have continued investigating had he selected a mitigation strategy that included Mason's background.

When counsel makes a strategic decision after incomplete investigation, that decision is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. But, like all other strategic decisions, courts "apply[] a heavy measure of deference" to a decision not to investigate. *Id.*; see *Rompilla v. Beard*, 545 U.S. 374, 381 (2005). A reviewing court therefore must evaluate whether, under the circumstances "as seen 'from counsel's perspective at the time,'" a reasonable attorney would have investigated further. *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 689).

Here, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigation circumstances was supported by reasonable professional judgment." *Burger v. Kemp*, 483 U.S. 776, 794 (1987). Counsel knew enough about Mason's background to identify potential mitigation avenues, and "there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 795. Having decided not to present evidence of Mason's background at sentencing, counsel "reasonably

determined that he need not undertake further investigation to locate witnesses who would make statements about [the defendant's] past." *Id.* Counsel's termination of the investigation was thus a product of reasoned strategic judgment, not inattention. Cf. *Wiggins*, 539 U.S. at 526 (finding that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment" because counsel only decided against a mitigation defense at the last moment). "[C]ounsel has wide latitude in deciding how best to represent a client," *Yarborough*, 540 U.S. at 5-6, and Mason's counsel exercised that latitude here.

2. Trial counsel's mitigation strategy was objectively reasonable.

Trial counsel adopted an informed and reasonable mitigation strategy: He decided the benefits of introducing evidence of Mason's background were outweighed by the risk of the State's potential rebuttal evidence. J.A. 1736 (Coulter believed "the rebuttal [was] stronger than any mitigation" he would get out of Mason's background or Dr. Spare's testimony.). The Sixth Circuit afforded no deference to this reasoned judgment—let alone a strong presumption that the strategy was reasonable—and instead concluded that counsel's strategy was, by definition, ineffective because counsel had not conducted sufficient investigation before selecting it. App. 34a. But the Sixth Circuit's characterization of counsel's mitigation investigation is inaccurate, as explained above, and its reasoning is flawed. The question here is whether, in light of the investigation conducted, counsel's decision to reject a particular

mitigation strategy—and corresponding decision to forgo additional investigation—was reasonable and therefore is entitled to deference.

Strickland's strong presumption in favor of counsel's strategic judgments means that counsel can be constitutionally effective at mitigation even if they do not present certain mitigation evidence. In *Burger*, 483 U.S. 776, this Court held that counsel did not provide ineffective assistance by declining to introduce mitigation evidence of his client's "troubled family background" for two reasons: first, the evidence was "by no means uniformly helpful" to the defendant, *id.* at 793; and, second, "it was surely not unreasonable for [counsel] to have concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence," *id.* at 792. Even where this Court has found ineffective assistance at mitigation, it nevertheless has reiterated that *Strickland* does not "require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins*, 539 U.S. at 533; see *id.* at 525 (holding that counsel's decision was unreasonable because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

Moreover, the Court has specifically recognized that it can be a sound sentencing strategy to withhold potentially mitigating evidence in order to prevent the introduction of damaging rebuttal evidence. In *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court deferred to counsel's strategic decision not to present certain mitigating evidence

because it would have allowed the prosecution to introduce evidence of the defendant's criminal history, infidelity, and unfavorable psychiatric assessment. *Id.* at 186-87. Similarly, had counsel introduced evidence of the defendant's non-violent character, it would have "opened the door for the State to rebut with evidence of petitioner's prior convictions." *Id.* at 186. Had counsel "attempted to put on evidence that [the defendant] was a family man, they would have been faced with his admission at trial that, although still married, he was spending the weekend furlough with a girlfriend." *Id.* This Court recognized that counsel reasonably could have viewed the rebuttal evidence as particularly damaging to the defendant's interests and thus decided to avoid opening the door.

Other circuits have adhered to the strong presumption that counsel's mitigation strategy is reasonable when counsel adopts the strategy after carefully weighing the benefits of mitigating evidence against the risks of possible rebuttal evidence. See, e.g., *Edwards v. Ayers*, 542 F.3d 759, 775 (9th Cir. 2008) (no ineffective assistance for failing to present mental health evidence where the evidence was "highly aggravating in its own right and would open the door to even more damaging evidence"); *Smith v. Quarterman*, 471 F.3d 565, 572 (5th Cir. 2006) (no ineffective assistance where trial counsel decided not to present mitigating evidence for fear that it would open the door to a "wealth of bad information"); *St. Aubin v. Quarterman*, 470 F.3d 1096 (5th Cir. 2006) (decision not to introduce testimony of petitioner's mental-health history was strategic because it would have opened the door to testimony regarding the petitioner's violent history);

Brodit v. Cambra, 350 F.3d 985 (9th Cir. 2003) (decision not to introduce testimony in child-sex abuse case to prevent damaging rebuttal evidence was reasonable); *Williams v. Woodford*, 384 F.3d 567 (9th Cir. 2002) (decision not to present evidence was reasonable strategy because its introduction would have opened the door to damaging rebuttal evidence of gang activities).

Trial counsel made a reasoned decision to avoid presenting evidence of Mason's background because he feared it might open the door to highly damaging rebuttal evidence. In making this decision, counsel considered several relevant factors: his understanding of Ohio's laws of evidence, the trial judge's attitude toward rebuttal evidence, the prosecutor's rebuttal evidence, and the facts of Mason's background. Counsel was familiar with the Ohio Supreme Court's opinion in *Ohio v. DePew*, 528 N.E.2d 542 (Ohio 1988), which says that prosecutors "must be empowered to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false." *Id.* at 554. The trial judge already had said he would admit rebuttal evidence of Mason's criminal history if trial counsel presented Dr. Spare's testimony that Mason was unlikely to be a repeat violent offender, App. 38a; J.A. at 1602-1603 (citing *DePew*, 528 N.E.2d 542), and counsel believed the trial judge had a "hair trigger" approach to admitting rebuttal evidence in general. J.A. 1737.

Counsel was particularly concerned about opening the door to rebuttal here because he knew what the prosecution hoped to introduce: evidence of Mason's criminal history, including testimony that

he had raped and threatened Danielle Miller only months before Dennis was raped and murdered. J.A. 1600-01. Coulter was most concerned about Miller's evidence because "she was similar aged to the victim of this case," her rape occurred "three or four months before this alleged incident," and "there was a threat of force." J.A. 1711. Coulter worried "that the jury would see through her, possibly the pain, and it would be damaging to our plea for [Mason's] life." *Id.* Coulter felt Miller's testimony "was a substantial danger" to Mason, J.A. 1712, and he tracked down Miller to verify her intent to testify, J.A. 1650-51.

Coulter then discussed his mitigation dilemma with attorneys at the Ohio Public Defender's Office, J.A. 1721-22, and reviewed the mitigation proceedings from other capital cases in Marion County, J.A. 1714-16. According to Coulter, he and attorneys from the Public Defender's Office agreed "that it would probably not be best" to introduce background evidence in light of Miller's rebuttal evidence. J.A. 1721. With all these factors in mind, Mason's counsel selected a mitigation strategy: He decided not to introduce evidence of Mason's background in mitigation, and instead to present evidence of mercy, Mason's good conduct in jail, and residual doubt.

Counsel's decision was reasonable for all the reasons described above, even if there was only a reasonable *possibility* that presenting evidence of Mason's background would open the door to highly damaging rebuttal evidence. Coulter reasonably believed that the trial court would allow the State's rebuttal evidence. And attorneys are not obligated to risk an adverse evidentiary ruling at trial in hopes of

reversal on appeal, especially when a client's life is at stake. See App. 57a (Boggs, C.J., dissenting). Furthermore, counsel was surely aware that evidence of Mason's background could cut both ways, even without the State's rebuttal. Mason's background indisputably includes a long personal history of drug use, drug dealing, running away, and criminal activity. Any attempt to portray this history sympathetically would no doubt have been countered by the state's alternative portrayal of Mason's background. And, as Chief Judge Boggs noted in his dissent, "it is entirely possible that, had defense counsel pursued a mitigation strategy that relied on extensively describing Mason's character and background, one of the family members might accidentally have commented in some way on Mason's criminal history, which would have opened the door to the disastrous rebuttal evidence even under the [Sixth Circuit's] reading of *DePew*." *Id.*

If the Sixth Circuit's decision stands, it will raise the *Strickland* bar for counsel's mitigation performance to an unprecedented level. See App. 58a ("This opinion sets an almost impossibly high bar for defense counsel in capital cases.") (Boggs, C.J., dissenting). Counsel would have to devote significant time and resources to mitigation investigation even when they know they will not be able to use the fruits of the investigation. Here, counsel decided he should not introduce testimony about Mason's background because, if he did, the trial court would likely allow damaging rebuttal evidence. But the Sixth Circuit nevertheless found that counsel was obligated to continue investigating Mason's background. "Nothing in *Strickland* or its progeny requires defense counsel to go to such

extreme lengths in order to meet the (relatively low) threshold of 'reasonably effective assistance.'" App. 59a (Boggs, C.J., dissenting).

B. The Sixth Circuit violated AEDPA's mandate of deference to state courts by rejecting both the Ohio courts' reasonable resolution of Mason's claim and their interpretation of Ohio law.

The Sixth Circuit afforded no deference to the Ohio courts' resolution of Mason's ineffective assistance claim, instead conducting its own independent evaluation of how it thinks *Strickland* applies to these facts. There is no question that the Ohio courts properly identified the law of ineffective assistance and applied that law when evaluating Mason's claim. Even if the Ohio courts' ineffective assistance analysis was wrong—and it was not—the Sixth Circuit failed to show how that analysis was *unreasonable*.

AEDPA dictates that a federal court can grant habeas relief only if a state court's "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). A state court unreasonably applies clearly established federal law when it "identifies the correct governing legal principle from this Court's decisions, but unreasonably applies that principle to the facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 391. Thus, if a state court properly identifies *Strickland* as the analytical framework for

evaluating an ineffective assistance claim, a federal habeas court can only grant a writ upon concluding that the state court's application of *Strickland* was objectively unreasonable. *Id.* at 410-11; see *Bell v. Cone*, 535 U.S. 685, 699 (2002). A federal court cannot grant habeas relief simply because it "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Had the Sixth Circuit adhered to this standard of review, it would have been forced to recognize that the Ohio courts' resolution of Mason's claim was objectively reasonable and accordingly would have denied the writ.

1. The state courts' conclusion that Mason's trial counsel did not render ineffective performance was not objectively unreasonable.

The Sixth Circuit improperly refused to defer to the state courts' reasonable conclusion that trial counsel's mitigation performance was constitutionally adequate under *Strickland*. Instead, the Sixth Circuit dismissed the Ohio Supreme Court's interpretation of Ohio law, interpreted Ohio law itself, and independently evaluated trial counsel's mitigation strategy. The court then concluded that counsel rendered ineffective assistance under *Strickland*. The Sixth Circuit never established, however, that the Ohio courts' resolution of the same issue was objectively unreasonable.

On direct review, the Ohio Supreme Court agreed with trial counsel's analysis of the

admissibility of rebuttal evidence, and denied relief on Mason's claim of ineffective assistance at mitigation. The court reasoned that Mason could not have presented evidence about his character and rehabilitation potential without risking the State's introduction of negative rebuttal evidence:

> [Mason's] records also show prior involvements with the criminal and juvenile justice systems, and other unfavorable matters. Mason could not have presented evidence as to his good character and rehabilitation potential without risking the introduction of negative evidence by the state in rebuttal.
>
> Similarly it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation. We will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently.

App. 341a (internal citation omitted).

The Sixth Circuit reached a contrary conclusion, but it offered no persuasive reason why the state courts' ruling was objectively unreasonable. The Sixth Circuit ignored the Ohio Supreme Court's reasonable resolution of Mason's claim, and instead interpreted both *DePew* and the trial court's

evidentiary rulings about *DePew* narrowly. App. 36a-38a; see also *Bradshaw v. Richey*, 546 U.S. 74 (2005) (finding that the Sixth Circuit had disregarded the Ohio Supreme Court's interpretation of state law to overturn a conviction and death sentence). *DePew* held that a prosecutor's right to "rebut false or incomplete statements regarding the defendant's criminal record" at mitigation is "limited . . . to those instances where the defense offers a specific assertion, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history." 528 N.E.2d at syllabus ¶ 3. But that holding does not speak to a prosecutor's ability to rebut other mitigation evidence at sentencing. In fact, *DePew* recognized more broadly "that the prosecutor . . . must be empowered to rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false." *Id.* at 554 (explaining that a prosecutor can rebut testimony that the defendant goes to a certain weekly mass with the presiding priest's testimony that the defendant never attends); see generally Ohio R. Evid. 404(A)(1); Weissenberger's Ohio Evidence Treatise § 404.5 (If a defendant introduces evidence of a particular character trait, the prosecution may offer rebuttal evidence attacking the defendant's character.).

Just one year after Mason's sentencing, the Ohio Supreme Court confirmed *DePew*'s general statement about a prosecutor's ability to introduce rebuttal evidence at sentencing: "[C]ounsel for the state at the penalty stage of a capital trial may introduce and comment upon . . . evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant."

Ohio v. Gumm, 653 N.E. 2d 253 at syllabus (Ohio 1995); see also *Ohio v. Lundgren*, 653 N.E.2d 304, 322 (Ohio 1995) ("Prosecutors may 'rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false'.") (quoting *DePew*, 528 N.E.2d at 554); *Ohio v. Raglin*, 699 N.E.2d 482, 490 (Ohio 1998) ("The prosecution was entitled to introduce relevant evidence rebutting the existence of any statutorily defined or other mitigating factor first asserted by the defense."). Trial counsel and the Ohio courts both reasonably concluded that, under Ohio law, a mitigation strategy including evidence of Mason's background would create a substantial risk that the trial court would admit highly damaging rebuttal evidence.

2. The state courts' conclusion that Mason did not suffer prejudice was not objectively unreasonable.

The Sixth Circuit also failed to defer to the state courts' objectively reasonable conclusion that Mason failed to establish prejudice. To prevail on an ineffective assistance claim, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of capital sentencing, a defendant can establish prejudice by showing a "reasonable probability that at least one juror would have struck a different balance" if counsel had performed effectively. *Wiggins*, 539 U.S. at 537. But Mason cannot meet this standard. And, more important, the Ohio courts reasonably concluded that Mason cannot meet this standard.

The Sixth Circuit found prejudice by reasoning that, because "Mason's jury initially reported a deadlock regarding his sentence . . . . [e]ven a slightly more compelling case for mitigation thus might have altered the outcome of the sentencing phase of Mason's trial." App. 34a. But this conclusion is wrong for three reasons: (1) the federal court refused to defer to the state courts' reasonable application of *Strickland*'s prejudice prong; (2) the federal court's analysis turned entirely on its conclusion that trial counsel's mitigation strategy (and corresponding decision to limit mitigation investigation) were unreasonable; and (3) the jury's initial deadlock at sentencing does not mean that the slightest additional evidence would have tipped the scales in favor of a life sentence.

First, the Sixth Circuit's prejudice analysis again reflects no deference to the state courts' reasonable resolution of Mason's ineffective assistance claim. On direct review, the Ohio Supreme Court concluded that Mason could not prevail on a claim of ineffective assistance at mitigation because he had failed to establish "a reasonable probability that different tactical choices at the penalty phase would have made a difference in the result." App. 341a (internal quotation and citation omitted). The central focus of counsel's strategy was avoiding damaging rebuttal evidence, in keeping with counsel's understanding of Ohio evidence law and the trial court's attitude toward rebuttal evidence. Thus, no matter how thoroughly counsel investigated Mason's background, he would never have introduced any evidence about it. The state court reasonably concluded that counsels' strategic decision was objectively reasonable and

that any alleged failing in counsel's mitigation investigation did not cause prejudice under *Strickland*.

Second, the Sixth Circuit's analysis turned on its willingness to supplant the state court's interpretation of state evidence law with its own. See *supra*, at pp. 28-29. The federal court apparently reasoned that trial counsel should have introduced background evidence because the trial court *might not* have admitted the prosecution's damaging rebuttal evidence: "Whether the trial court would have admitted the prosecutor's rebuttal evidence in response to a defense strategy based solely on the circumstances of Mason's troubled childhood remains a hypothetical question." App. 42a. But, as discussed above, counsel was not obligated to take that risk, and he acted reasonably by choosing a strategy calculated to avoid that risk. No matter how much additional mitigation investigation counsel conducted, he would not have presented additional background evidence to the jury. Thus, Mason cannot identify any prejudice resulting from counsel's alleged deficiencies.

Third, the fact that the jury initially deadlocked on Mason's sentence is not dispositive. The trial judge charged the jury on June 27, 1994, and the jurors deliberated for 75 minutes before recessing for the night. Sentencing Tr. at 4354. The jury resumed deliberations at 8:45 a.m. the next day. *Id.* at 4366. After a lunch break, the jury asked the court "what they should do if they are irreconcilably deadlocked on the three sentencing options." *Id.* at 4368. The court gave the jury additional instructions at 2:20 p.m., and the jurors deliberated for three hours that

afternoon. *Id.* at 4370-74, 4376. The following morning, the jury deliberated for five minutes before returning a verdict recommending that Mason be sentenced to death. *Id.* at 4379, 4382. At most, the jury deliberated three and one-half hours after announcing a deadlock. And even when the jury informed the trial judge of its initial deadlock—an 11-1 vote in favor of the death penalty—it did so in the form of requesting additional instructions.

3. The Sixth Circuit's erroneous ineffective assistance analysis here repeats the court's mistakes in *Spisak*, which is currently pending before the Court.

The deficiencies in the Sixth Circuit's *Strickland* analysis here are remarkably similar to those in *Spisak*, 512 F.3d 852, which is currently pending before this Court. In both *Spisak* and this case, the Ohio courts properly identified the law of ineffective assistance and applied that law when evaluating Mason's claim. But the Sixth Circuit did not defer to the Ohio Supreme Court's reasonable rejection of the petitioner's ineffective assistance claim in either case, instead conducting its own evaluation of how *Strickland* applied to the facts. And the Sixth Circuit did not, in either case, properly conclude that the state court's resolution of the Strickland claim was objectively unreasonable. This Court's decision in *Spisak*, then, will likely bear on the Sixth Circuit's deficient analysis here.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should hold this petition pending its decision in *Spisak*.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
ELISABETH A. LONG
Deputy Solicitor
ADAM VAN HO
Assistant Attorney General
30 E. Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
Keith Smith, Warden

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